The Edward J. DeBartolo Corporation *and* Service Employees International Union, Local 750, AFL–CIO, CLC. Case 12–CA–16098

December 28, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS, BROWNING, AND COHEN

On August 1, 1994, the General Counsel of the National Labor Relations Board issued an amended complaint alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the certification issued by the Board on November 24, 1993, in Case 12–RC–7611.[1] (Official notice is taken of the ''record'' in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the amended complaint and asserting certain affirmative defenses.

On September 28, 1994, the General Counsel filed a Motion to Transfer Proceedings to the National Labor Relations Board, Motion for Summary Judgment and Brief in Support Thereof and a Motion to Correct Certification of Representative and Brief in Support Thereof. On September 30, 1994, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motions should not be granted. The Respondent filed responses.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of its objections to conduct affecting the results of the election in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.[2]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times the Respondent, an Ohio corporation, with a place of business in Altamonte Springs, Florida, has been engaged in the business of owning and operating shopping malls.

During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations, derived gross revenues in excess of $100,000, of which in excess of $25,000 was derived from businesses which in turn met other than a solely indirect standard for assertion of the Board's jurisdiction. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Since at least July 7, 1991, and at all material times, the Union has been the designated exclusive bargaining representative of a unit of shopping mall maintenance employees employed by the Respondent, as described in successive collective bargaining agreements, the most recent of which is effective from July 6, 1994, to July 6, 1997.

The Respondent has recognized the Union as the exclusive bargaining representative of the employees in the above unit, and this recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from July 6, 1994, to July 6, 1997.

Pursuant to a Stipulated Election Agreement, on May 20, 1993, an election was held among the following employees (the voting group):

> All full-time and regular part-time food court maintenance employees including crew leaders, employed by the Employer at Altamonte Mall, but

[1] 313 NLRB 382.

[2] As indicated above, the General Counsel has also filed a motion to correct the certification issued by the Board in the representation proceeding. The General Counsel asserts therein that the Board inadvertently identified the voting group as an appropriate unit and failed to certify that the voting group was included in the overall unit represented by the Union. In its response to the General Counsel's motion, the Respondent states that it has no objection to correcting the certification in this manner. Accordingly, the General Counsel's motion to correct the certification of representative is granted, and the certification set forth at 313 NLRB 382, 383, is corrected to read as follows:

> IT IS CERTIFIED that Service Employees International Union, Local 750, AFL–CIO, CLC, may bargain for the voting group described below as part of the existing unit of shopping mall maintenance employees it currently represents:
>
> All full-time and regular part-time food court maintenance employees including crew leaders, employed by the Employer at Altamonte Mall, but excluding office clerical employees, guards and supervisors as defined in the Act, and all other employees.

> excluding office clerical employees, guards and supervisors as defined in the Act, and all other employees.

Pursuant to the Stipulated Election Agreement, the Respondent and the Union agreed that if a majority of the valid ballots were cast in favor of the Union, this would be deemed to indicate the voting group's desire to be included in the existing unit of mall maintenance employees already represented by the Union. A majority of the voting group voted in favor of representation by the Union at the May 20, 1993 election, and the Board so certified on November 24, 1993.

The employees in the recognized unit, including the voting group, constitute a unit appropriate for purposes of collective bargaining.

At all times since November 24, 1993, based on Section 9(a) of the Act, the Union has been, and continues to be, the exclusive collective-bargaining representative of the unit, including the voting group.

B. *Refusal to Bargain*

Since about mid-December 1993, the Union has verbally requested the Respondent to bargain with it as the exclusive bargaining representative of the voting group, and, since about mid-December 1993, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing since mid-December 1993, to bargain with the Union as the exclusive collective-bargaining representative of employees in the voting group, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.[3]

ORDER

The National Labor Relations Board orders that the Respondent, the Edward J. DeBartolo Corporation, Altamonte Springs, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Service Employees International Union, Local 750, AFL–CIO, CLC as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the following group of employees as part of the recognized appropriate unit of shopping mall maintenance employees employed by Respondent on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time food court maintenance employees including crew leaders, employed by the Employer at Altamonte Mall, but excluding office clerical employees, guards and supervisors as defined in the Act, and all other employees.

(b) Post at its facility in Altamonte Springs, Florida, copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

---

[3] As part of the remedy, the complaint requests that the Board require the Respondent to bargain in good faith with the Union as the exclusive representative of the voting group for the period set forth in *Mar-Jac Poultry*, 136 NLRB 785 (1962). The Respondent's answer denies that such a remedy is appropriate, however, and we agree. We find that such a remedy is inappropriate where, as here, the underlying representation proceeding involved a self-determination election. In such circumstances the certification merely certifies that the voting group voted to be included in the overall unit currently represented by the Union and that the Union may bargain for the voting group as part of that unit. Such a certification does not certify that the voting group constitutes a separate appropriate unit, or that the Union is the exclusive bargaining representative of the overall unit. In these circumstances, we find that a remedy which would effectively bar any representation petition until the parties had bargained for at least a year with respect to the voting group is inappropriate. Although we recognize that a *Mar-Jac* remedy has sometimes been included in prior Board orders in cases involving self-determination elections (compare *Raytheon Co*., 296 NLRB No. 162 (Oct. 11, 1989) (not reported in Board volumes), enfd. 918 F.2d 249 (1st Cir. 1990), and *American Printers & Lithographers*, 275 NLRB 1490 (1985), enfd. 820 F.2d 878 (7th Cir. 1987), with *Southern Indiana Gas Co*., 284 NLRB 895 (1987), enfd. 853 F.2d 580 (7th Cir. 1988)), no rationale is set forth in those decisions and thus it is unclear whether the issue was actually considered. In any event, for the reasons set forth above, we overrule such cases to the extent inconsistent herewith.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Service Employees International Union, Local 750, AFL–CIO, CLC as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees set forth below as part of the recognized appropriate unit of shopping mall maintenance employees employed by us:

> All full-time and regular part-time food court maintenance employees including crew leaders, employed by us at Altamonte Mall, but excluding office clerical employees, guards and supervisors as defined in the Act, and all other employees.

THE EDWARD J. DEBARTOLO CORPORATION